FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 453

CHESTER LINDSLEY, ARA HOVELSEN, PAUL'S DECORATORS' UNION, LOCAL NO. 136, AFL, ET AL.,

Appellants,

vs.

NEW DAYTON COMPANY,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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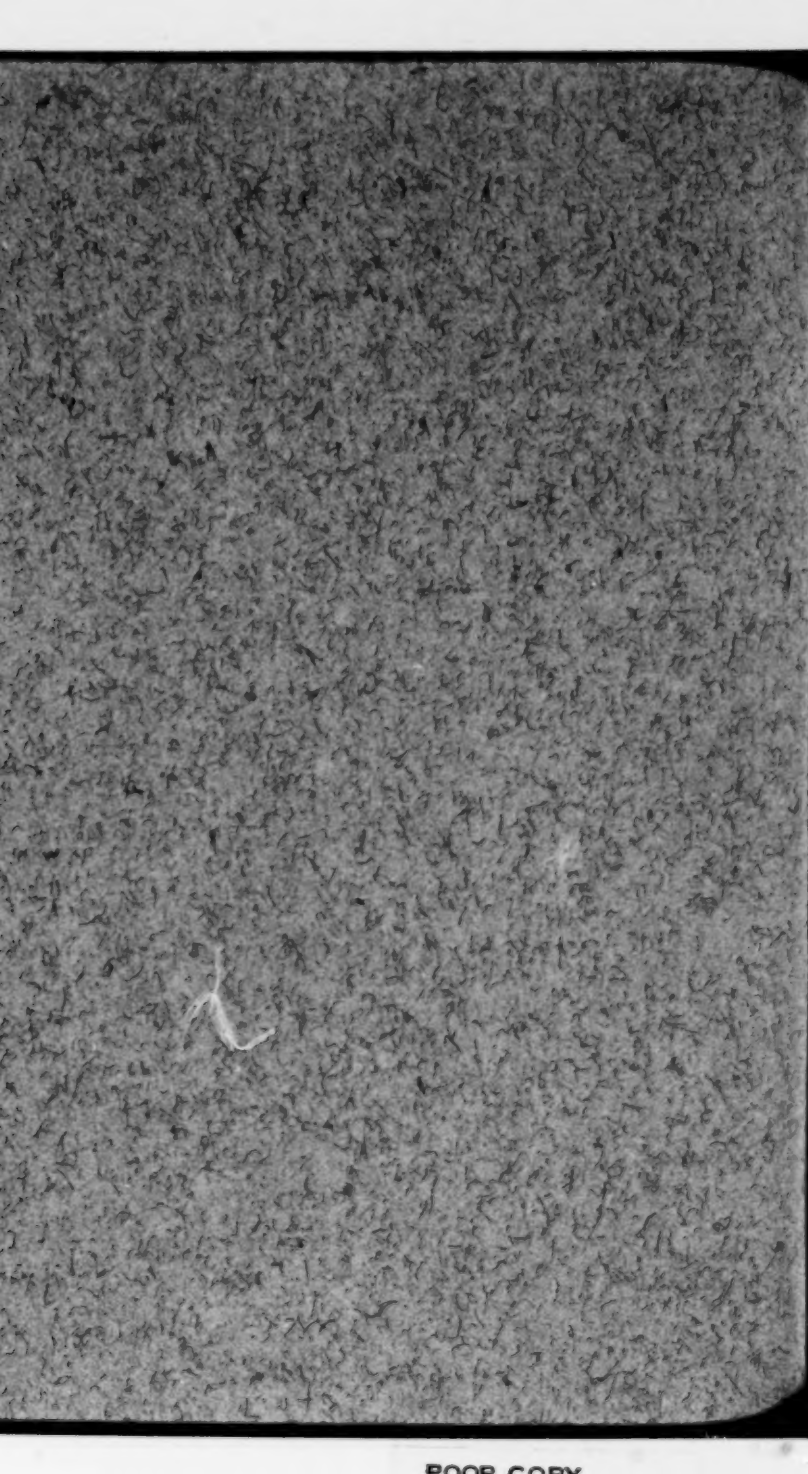

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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# No. 531

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CARPET, LINOLEUM AND RESILIENT FLOOR DECORATORS' UNION, LOCAL NO. 596, AFL, ET AL.,

*Appellants,*

*vs.*

THE DAYTON COMPANY

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

(Minnesota Supreme Court Case No. 34893)

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## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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### Opening Statement

Appellee's motion to dismiss this appeal is based upon contentions that the decision of the Supreme Court of Minnesota is sustainable upon non-federal grounds sufficient to support it and that this Court is without jurisdiction because

no substantial Federal question is raised. Appellee's motion to affirm is based upon the contention that previous decisions of this Court establish that no substantial question exists as to the constitutionality of section 3, Chapter 486, Session Laws of Minnesota for 1947, page 765, (Minnesota Statutes Annotated, section 179.42, hereinafter referred to as section 179.42).

In this brief we will state our reasons for believing that the decision of the state court is not sustainable upon non-federal grounds sufficient to support it, and that this appeal presents very substantial questions not previously decided by this Court. In presenting argument on the issue of substantiality, we will attempt to avoid repetition of matter contained in our previously filed Statement as to Jurisdiction, to which the Court is referred for an affirmative statement of our position.

## Argument

I. The Decision of the State Court Is Not Sustainable Upon Non-federal Grounds Sufficient to Support It.

Although appellee cites no case to support its argument on this point, we concede existence of the rule that where the record shows that, although there may be a federal question in a case, there is also an independent state question decided by a state court, which is in itself broad enough to sustain the judgment, the state decision will not be reviewed by this Court. The limitation of the rule is contained in the rule itself. *The independent state question decided by the state court must be, in itself, broad enough to sustain the judgment.* In *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773, 51 Sup. Ct. 252, this Court said:

> "But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to

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> ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157, 164; Union Pacific R. Co. v. Public Service Comm., 248 U. S. 67, 69, 70; Ward v. Love County, 253 U. S. 17, 22; Broad River Power Co. v. South Carolina, 281 U. S. 537, 540, 282 U. S. 187. As this Court said in Enterprise Irrigation District v. Farmers' Mutual Canal Co., supra: 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Creswell v. Knights of Pythias, 225 U. S. 246, 261.' "

It is also established that this Court upholds its jurisdiction where the record shows that the necessary effect of a judgment of a State court is denial of a Federal right. In *West Chicago R. R. Co.* v. *Illinois*, 201 U. S. 506, 520, 26 Sup. Ct. 518, this Court said:

> "As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in Chicago, Burlington and Quincy R. R. Co. *v.* Drainage Commissioners 200 U. S. 561."

See also *American Fire Ins. Co.* v. *King Lumber Co.*, 250 U. S. 2, 14, 39 Sup. Ct. 431; *Williams* v. *Kaiser*, 323 U. S. 471, 65 Sup. Ct. 363.

Against this background of established law, we direct attention to the factual background of the specific problem presented.

The appellants were enjoined: (a) From in any manner, individually or in concert, cooperating in, engaging in,

promoting or inducing a strike in connection with work for the plaintiff in the cutting and laying of any carpet, linoleum, tile, or other floor covering on jobs or orders with respect to which the measurements for said carpet, linoleum, tile or other floor coverings have been made or taken by persons who are not members of defendant union, or who are not members of any union, if and so long as such strike has as a purpose causing, coercing or inducing the plaintiff to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment, or any terms or conditions of employment of said non-union men; or which strike has as a purpose, causing, or coercing or inducing the plaintiff to encourage, persuade, require or otherwise cause the said non-union employees of plaintiff to join said defendant union against their will, and (b) From striking until they have complied with section 179.06 of the Minnesota Labor Relations Act. (State Court Printed Record pp. 328)

Appellee's argument is that because the judgment affirming the injunction rests in part upon section 179.06 of the Minneosta Labor Relations Act, and the federal question of the constitutionality of section 179.06 was not squarely raised in the Minnesota Supreme Court, the decision of the state court is sustainable upon non-federal grounds.

A copy of section 179.06 of the Minnesota Labor Relations Act is attached hereto as appendix 1. The provisions of said section 179.06 are implemented by those of section 179.11 which provides by clauses (2) and (10) that it shall be an unfair labor practice and an unlawful act: "For any employee or labor organization to institute a strike if the calling of such strike is in violation of sections 179.06 or 179.07." Section 179.07, not involved here, makes provision for an additional waiting period of thirty days be-

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fore a strike may be called when the public interest is involved.

It will be noted from the foregoing that under said section 179.06, if employees or a labor organization desire to negotiate a collective bargaining agreement, make changes in an existing agreement, or changes in existing rates of pay, rules or working conditions, two written notices are required before they may strike. The first notice is to the employer advising him of the desired change. Upon the expiration of ten days after service of the first written notice, a strike notice may be served. Upon the expiration of ten days after service of the strike notice the employees are free to strike, unless the public interest clause of section 179.07 is invoked.

The strike notice is required in every case before there may be a strike. The first notice is required only when the employees or labor organization request the changes referred to in the statute. In this case the employees through their representative served the strike notice but did not serve the first notice. The employees thought service of the first notice was not necessary because it was the employer who originally had made changes in the existing status. The state court held, however, under the facts which it found, that service of the first notice was required.

The question of the constitutionality under the federal law of section 179.06 was raised in the state district court by answer (State Court Printed Record p. 20). That court held that the section was constitutional (State Court Printed Record p. 324). The question was not squarely raised in the state supreme court by the Assignment of Errors and was not discussed by that court, although in holding that appellants had violated section 179.06 and in sustaining the judgment of the district court it would seem that the state supreme court necessarily concluded that the section was constitutional. We submit, therefore, that

the decision of the state court, to the extent that it rests upon section 179.06 is not based upon a question of state law not subject to review by this Court.

Whatever the merit may be to the point just made, this Court has jurisdiction because even if the question relating to section 179.06 should be treated as one of state law, the decision, to the extent it rests on that statute, is not broad enough to sustain the entire judgment and the necessary effect of the judgment is denial of a federal right. The injunction, to the extent it is based on section 179.06 does not permanently bar appellants from striking because of this controversy. This impediment may be removed if appellants serve the two notices which the state court held were required. Such a procedure would be futile, however, because the other provisions of the injunction, based upon section 179.42 stand as a permanent bar to such action. It follows, from decisions of this Court previously referred to:

1. The independent state ground of the decision, if it is a state ground, is not a sufficient one for the decision because it is not broad enough and not adequate in itself to sustain the judgment.

2. The necessary effect of the decision is denial of a federal right specially set up and claimed.

These reasons exist because even if the bar raised by that part of the judgment based on section 179.06 should be removed, as it easily may be, the impediment of the ruling on the federal question would remain as a permanent bar. Therefore, the judgment by its necessary operation does deny claims of these appellants which are based upon the Constitution of the United States and we respectfully submit that this Court has jurisdiction to inquire whether these claims are sustained by that instrument.

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II. Questions Presented by this Appeal Are Substantial

We preface discussion on this point by quoting the provisions of section 179.42:

> "179.42. It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer, to refuse to handle or work on particular goods or equipment or perform services for an employer, or to withhold patronage, or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer to persuade or otherwise encourage or discourage his employees to join or to refrain from joining any labor union or organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union organization."

Without repeating statements contained in the Statement as to Jurisdiction, we submit that a mere reading of this section discloses that by its enactment the Minnesota legislature has attempted to impose such sweeping prohibitions against the exercise of fundamental liberties that any case which presents a question of its validity necessarily involves questions of the gravest and most substantial nature.

a. *Appellants are confronted with prohibitions of the statute and the injunction.*

Before considering the points raised by appellee we point out that in their existing controversy with their employer appellants are confronted not only by the prohibitions of the injunction. They are also faced with the prohibitions of the statute. While this statute stands with the approval of the state court, these appellants are not free in this controversy to cause loss or injury to the Dayton Company, to refuse to handle or work on particular goods or equipment,

to refuse in concert to perform services for their employer, to withhold patronage or other business intercourse, or attempt to induce others to withhold patronage or business intercourse from their employer, if their purpose is merely to induce the employer to persuade or encourage employees to join their union. Obviously their liberty of free discussion is restrained. Neither they nor others in sympathy with them, are free, acting in concert, to withdraw patronage from the Dayton Company or to advertise the existence of the dispute and ask others to withdraw such patronage, by the use of banners, articles in labor newspapers or other methods.

This court in *Thornhill* v. *Alabama*, 310 U. S. 88, 104, 60 Sup. Ct. 736, stated the applicable rule when it said:

> "The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the

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> merits of ideas by competition for acceptance in the market of public opinion (Note No. 22). We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

Previously this Court in the same case said, page 98:

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissable conduct and warns against transgression. Stromberg *v.* California, 283 U. S. 359, 368. Schneider *v.* State, 308 U. S. 147, 155, 162-163. Compare Lanzetta *v.* New Jersey, 306 U. S. 451."

We respectfully submit that under the provisions of the statute and the circumstances of this case the question of the validity of the statute should be considered by this Court on the face of the statute. *Thornhill* v. *Alabama, supra; Winters* v. *People of New York,* 333 U. S. 507, 68 Sup. Ct. 665; *Stromberg* v. *California,* 283 U. S. 359, 51 Sup. Ct. 532.

b. *A Violation of Section 179.42 is a Misdemeanor*

Appellee questions our statement that a violation of Section 179.42 is a misdemeanor. It is true that neither the Minnesota Labor Relations Act nor Section 179.42 expressly state that violation of their provisions is a misdemeanor. Both acts declare certain activities to be unlawful acts.

An examination of the Labor Relations Act, coded as Minnesota Statutes Annotated, Section 179.01 through Section 179.17, will disclose that it is not true, as argued by appellee, that the Minnesota legislature declared certain

activities proscribed by that act to be unlawful so as "to permit injunctions against such acts under Minnesota Statutes Annotated Chapter 185." Express provisions of the statute solve the injunction problem in an entirely different manner. Certain violations by either employers or employees are declared to be "unfair labor practices". See Section 179.11, which enumerates unfair labor practices by employees and labor organizations and Section 179.12 which lists unfair labor practices by employers. To supplement these sections the legislature provided in Section 179.14 that: "In any suit to enjoin any of the unfair labor practices set forth in Sections 179.11 and 179.12 the provisions of Sections 185.02 to 185.19 shall not apply." Sections 185.02 to 185.19 contain the Minnesota anti-injunction act. Any violation of Sections 179.11 or 179.12 is an "unfair labor practice" but not every violation thereof is an unlawful act. See Section 179.11 (10) and 179.12(7). The anti-injunction act is expressly made inapplicable to "unfair labor practices" without regard to whether or not they may also be "unlawful acts". It follows that it was not the purpose of the legislature, in declaring acts "unlawful" to make them subject to injunction. They are enjoinable because they are "unfair labor practices".

As appellee points out, Section 613.78 which is a part of the Minnesota Criminal Code provides: "When the performance of any act is prohibited by statute, and no penalty for the violation of the same shall be imposed in any statute, the doing of such act shall be a misdemeanor." It cannot be assumed that by declaring certain acts to be "unlawful acts" the legislature was using words to which it did not intend meaning or effect to be given. The only conclusion is that the legislature intended this language to be implemented by Section 613.78. See discussion of this problem in 24 Minn. Law Review, 217, 232. As there stated:

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"It certainly cannot seriously be contended that the commission of an 'unlawful' act is not a performance of an act 'prohibited by statute'."

Although to our knowledge the Minnesota Supreme Court has not specifically passed upon this question, the Minnesota Attorney General, the chief law enforcement officer of the State, has ruled that an "unlawful act" under the Minnesota labor law is a misdemeanor. See Report of Minnesota Attorney General, 1940, page 143, Opinion No. 104, a copy of which is attached hereto as Appendix 2. Since the Attorney General's opinion was written Minnesota statutes have been coded. Section 11 of the Labor Relations Act, referred to in the opinion, is Section 179.11 which lists unfair labor practices and unlawful acts of employees and labor organizations. Mason's Minnesota Statutes of 1927, Section 10047, referred to in the opinion is Section 613.78, quoted above.

c. *Appellants Are Prohibited from Striking to Protect Jurisdiction of Their Craft*

In our Statement as to Jurisdiction we asserted and we repeat here that full examination of the facts in the record will disclose existence of the question of whether or not employees may be prohibited from striking to protect the jurisdiction of their craft or trade where the employer takes part of their work away from, instructs them not to do that work, and gives it to persons neither skilled in the trade nor apprentices therein who are compensated at a lessor rate of pay. This assertion is based upon uncontroverted facts in the record referred to in our Statement as to Jurisdiction which were overlooked or ignored by the State courts. We request this Court to examine the record to ascertain the validity of the point just made as well as the related question of invalidity of the conclusion of the State courts as to the purpose of the proposed strike. Un-

der the circumstances existing here, the authority of this Court to make such an independent search of the record is clear. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, etc.*, 312 U. S. 287, 61 Sup. Ct. 552; *Great Northern Ry. Co.* v. *Washington*, 300 U. S. 154, 57 Sup. Ct. 397; *Haley* v. *Ohio*, 332 U. S. 596, 68 Sup. Ct. 302.

d. *The Statute and the Injunction Are Not Limited to Discrimination*

Appellee asserts that in our Statement as to Jurisdiction we referred to the prohibitions of Section 179.42 without pointing out that these acts are proscribed only when their purpose is to "induce or coerce an employer to persuade or otherwise encourage or discourage his employees to join or refrain from joining any labor union or organization" etc. Appellee errs. See typewritten Statement as to Jurisdiction, page 10. Indeed, we believe one of the principal grounds upon which this appeal should be sustained is that a State legislature may not prohibit the exercise of rights protected by the First Amendment where the purpose is to induce another to do or not to do that which he has a constitutional right to do. As this Court said in *A. F. of L.* v. *Swing*, 312 U. S. 321, 325, 61 Sup. Ct. 568:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or the judicial organ of the state."

If the exercise of constitutional rights may be prohibited by legislative fiat, which states that the purpose for which they are exercised is unlawful, when that purpose is not inherently wrong or evil, then constitutional guarantees become a fiction. This Court in referring to liberties protected by the First Amendment has said "any attempt to

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restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be cured, which in other contexts might support legislation against attack on due process grounds will not suffice. These rights rest on firmer foundation." *Thomas* v. *Collins*, 323 U. S. 516, 530, 65 Sup. Ct. 315.

In our Statement as to Jurisdiction, we said that it is not, except as made so by Section 179.42, either unlawful or an unfair labor practice under Minnesota law for an employer to induce employees to join a union, and referred to Section 179.12(3). Appellee argues that our reference to Section 179.12(3) is misleading, quotes that section and says: "It is clear that said section *does* prohibit encouraging employees to join a union, except as permitted by the express provisions therein." A mere reading of the section will reveal that in the absence of discrimination it *does not* prohibit encouraging employees to join a union. This is the important distinction between Section 179.12(3) relating to acts of employers and Section 179.42 relating to acts of employees; this and the fact that a violation of Section 179.12(3) is not an unlawful act.

Section 179.12(3) because it is limited to discrimination is consistent with what this Court said in *Thomas* v. *Collins*, 323 U. S. 516, 537, 65 Sup. Ct. 315:

> "Accordingly, decision here has recognized that employers attempts to persuade action with respect to joining or not joining unions are within the First Amendment's guaranty. National Labor Relations Board *v.* Virginia Electric and Power Co., 314 U. S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed."

Section 179.42 is not consistent with the statement just quoted. Section 179.12(3) is not directly involved in this appeal. The Minnesota Supreme Court did not accept the decision of the district court and appellee's argument that it was applicable. It said:

> "5. The court found that defendants have threatened to and will commit violations of Sec. 179.12(3) unless restrained. This section relates solely to unfair labor practices by employers. It does not apply to acts of employes or labor unions. Whether acts by employes or labor organizations seeking to compel an employer to violate Sec. 179.12(3) may be enjoined, we need not determine; nor do we find it necessary to determine whether M.S.A. c. 185 prohibits the issuance of an injunction to restrain such acts."

Appellee states that our argument as to the substantiality of the appeal is predicated upon questions of fact which were determined against appellants by the Minnesota courts. In a limited sense this is partially true. That is why we request this Court to consider the question of the validity of the statute upon its face and to exercise of its unquestioned power to make an independent examination of the record to ascertain if the evidence supports the decision against the claim of Federal right.

An ambiguity which exists in the decision of the State court furnishes the basis for the statement of appellee that the substantial questions in the appeal are based upon questions of fact determined adversely to appellants. In considering the question of whether appellants had violated Section 179.06 the Minnesota Supreme Court did say in paragraph 4 of its opinion that the purpose of appellants was to require the Dayton Company to discriminate against the non-union men. In paragraph 2 it previously had upheld the sufficiency of the evidence to support the trial

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court's finding that the purpose of the strike was mainly to coerce appellee "*into encouraging the three non-union men to join the union*". In paragraph 5 the State Supreme Court did not rule upon the question of whether acts of employees seeking to compel an employer to violate Section 179.12(3) may be enjoined. It rested decision on Section 179.42. In paragraph 6, in considering the constitutionality of Section 179.42 the State court said:

> "While the precise question here is not whether a state may enact laws barring closed-shop or union-shop contracts, the same considerations are involved in determining the constitutionality of such acts as in determining whether our state may constitutionally *prohibit discrimination* against nonunion employes, absent the closed-shop or union-shop contract, which we recognize as valid if entered into according to our law. Sec. 179.12(3)." (Italics supplied)

It may be argued that the State court considered Section 179.42 as merely prohibiting attempts to require discrimination, but such argument overlooks the express language of both the statute and the injunction. This ambiguity was called to the State court's attention in the Petition for Rehearing (pp. 8 and 9). Whatever the language of the opinion there is no question but that neither the statute nor the injunction upheld by the opinion is limited to discrimination. Our previous discussion of the statute need not be repeated. The injunction specifically prohibits appellant from striking, if the strike, "*has as a purpose, causing, or coercing, or inducing the plaintiff to encourage, persuade, require or otherwise cause the said non-union employees of plaintiff to join said defendant union against their will.*" (Italics supplied) (State Court Printed Record, p. 328)

If, in the face of the plain language of Section 179.42 the Minnesota Supreme Court, intended to limit the operation of Section 179.42 to discrimination, it should have ordered

modification of the above quoted language of the injunction. Leaving the permanent injunction stand as it does, results in a denial of a Federal right, whatever the view of the facts.

e. *A Momentous Question Exists Under Any View of the Facts*

Whatever the view of the facts, the statute or the injunction, there remains directly presented by the statute, the injunction and the decision of the Minnesota Supreme Court, the "momentous" question, of the right to prohibit by injunction the concerted refusal of union members to work with non-union workers.

Appellee disposes of the point that Chapter 486, Laws of 1947 violates the Fourteenth Amendment because of the exclusion of employees subject to the Federal Railway Labor Act by stating that it was never raised in the court below. The specific question was squarely raised in the Petition for Rehearing. It was necessarily before the State court at all times because of our contention that all of Chapter 486, Laws 1947 violated the Fourteenth Amendment.

III. Appellee's Authorities Discussed

Appellee in support of its contention that the question is not substantial relies upon decisions of this Court also relied upon by the Minnesota Supreme Court. They are *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 69 Sup. Ct. 684; *Lincoln Federal Labor Union* v. *Northwest Iron and Metal Company*, 335 U. S. 525, 69 Sup. Ct. 251; *International U.A.W.A.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 69 Sup. Ct. 516; *A. F. L.* v. *American Sash & Door Company*, 335 U. S. 538, 69 Sup. Ct. 258; *Whitaker* v. *North Carolina*, 335 U. S. 525, 69 Sup. Ct. 251; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722,

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62 Sup. Ct. 807; *Algoma Plywood & Veneer Co.* v. *Wisconsin E. R. Board*, 336 U. S. 301, 69 Sup. Ct. 584; *Hotel & Restaurant Employees' Int'l. Alliance* v. *Wisconsin E. R. Board*, 315 U. S. 437, 62 Sup. Ct. 706.

In *Algoma Plywood and Veneer Company* v. *Wisconsin E. R. Board, supra*, the only issue was whether either the National Labor Relations Act or the Labor Management Relations Act of 1947 had supplanted those provisions of the Wisconsin Act which require a vote by a specified percentage of the employees in an appropriate unit before a union shop contract may be entered into. It was decided by this Court that the Wisconsin Act has not been so supplanted.

In *International Union U.A.W.A.* v. *Wisconsin Employment Relations Board, supra*, the question principally considered was similar to the one involved in the *Algoma* case. It was whether paramount Federal law had ousted the State of Wisconsin of jurisdiction over the issues involved in the dispute.

In *Giboney* v. *Empire Storage and Ice Company, supra*, this Court held that the State of Missouri could apply its State law prohibiting activities in restraint of trade to a labor organization and restrain picketing carried on as an essential and inseparable part of conduct designed to violate that law. The Missouri restraint of trade statute is of general application and the right of States to enact such legislation is well established. This Court merely upheld the right of the State to enjoin activities of a special class designed as an integral part of a plan to violate a statute of general application. In its opinion this Court distinguished *Thornhill* v. *Alabama*, 310 U. S. 88, 60 Sup. Ct. 736. We believe analysis of the cases will demonstrate that the rule applied in the *Thornhill* case rather than the rule applied in the *Giboney* case is applicable here. For

example, unlike the *Giboney* case the record here requires that the actions of the union be treated as an isolation for the only parties directly involved are the employer, the employees and incidentally the union. Here, as in the *Thornhill* case, both the statute and the injunction are so broad that they can be utilized to ban truthful publication and other constitutionally protected acts which the *Giboney* case recognizes as entitled to protection.

The closed shop cases, *Lincoln Federal Labor Union* v. *Northwest Iron and Metal Company*, *Whitaker* v. *North Carolina* and *A. F. L.* v. *American Sash & Door Company*, did not reach the questions involved here. They did not involve the right to strike. They did not determine whether or not union men may be required to work with non-union men. They did not in any way involve the question of the right of members of a craft to protest and strike when an employer takes from them work that is traditionally theirs, instructs them not to do such work and gives it to persons who are compensated at a lesser wage. They did not involve the validity of a statute such as section 179.42 with its direct prohibition against the exercise of fundamental liberties for the accomplishment of objectives directly related to conditions of employment.

In *Carpenters Union* v. *Ritter's Cafe, supra*, it was merely held that picketing could be restrained under a Texas statute prohibiting activities in restraint of trade, where, in a controversy between a contractor and a carpenter's union, the union picketed a restaurant located some distance from the scene of the actual dispute which was not owned or operated by the employer with whom the dispute existed. This Court pointed out that it was not in that case "confronted with a limitation upon speech in circumstances where there exists an interdependence of economic interest of all engaged in the same industry".

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In *Hotel and Restaurant Employees International* v. *Wisc., E. R. Board, supra,* this Court made it clear that it affirmed the decision of the Wisconsin Court because the statute and the Order of the lower court as construed by the Wisconsin Supreme Court only prohibited violence.

For the reasons stated here and in our Statement as to Jurisdiction, we ask that the appellants motion to dismiss or affirm be denied.

Respectfully submitted,

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## APPENDIX 1

MINNESOTA STATUTES ANNOTATED

"179.06. Subd. 1. When an employee, employees, or representative of employees, or labor organization shall desire to negotiate a collective bargaining agreement, or make any change in any existing agreement, or shall desire any changes in the rates of pay, rules or working conditions in any place of employment, it shall give written notice to the employer of its demand, which notice shall follow the employer if the place of employment is changed, and it shall thereupon be the duty of the employer and the representative of employee or labor organization to endeavor in good faith to reach an agreement respecting such demand. An employer shall give a like notice to his employees, representative, or labor organizations of any intended change in any existing agreement. If no agreement is reached at the expiration of ten days after service of such notice, any employees, representative, labor organization, or employer may give notice of intention to strike or lockout, as the case may be, but it shall be unlawful for any labor organization or representative to institute or aid in the conduct of a strike or for an employer to institute a lockout, unless notice of intention to strike or lockout has been served by the party intending to institute a strike or lockout upon the labor conciliator and the other parties to the labor dispute at least ten days before the strike or lockout is to become effective. Unless the strike or lockout is commenced within 90 days from the date of service of the notice upon the labor conciliator, it shall be unlawful for any of the parties to institute or aid in the conduct of a strike or lockout without serving a new notice in the manner prescribed for the service of the original notice, provided that the 90-day period may be extended by written agreement of the parties filed with the labor conciliator.

"Notice by the employer shall be signed by him or his duly authorized officer or agent; and notice by the employees shall be signed by their representative or its officers, or by the committee selected to conduct the strike. In either case the notice shall be served by delivering it to the labor conciliator in person or by sending it by registered mail addressed to him at his office. The notice shall state briefly the nature of the dispute and the demands of the party who serves it. Upon receipt of a notice, the labor conciliator shall fix a time and place for a conference with the parties to the labor dispute upon the issues involved in the dispute, and he shall then take whatever steps he deems most expedient to bring about a settlement of the dispute, including assisting in negotiating and drafting a settlement agreement. It shall be the duty of all parties to a labor dispute to respond to the summons of the labor conciliator for joint or several conferences with him and to continue in such conference until excused by the labor conciliator, not beyond the ten-day period heretofore prescribed except by mutual consent of the parties.

"Subd. 2. The labor conciliator may take jurisdiction of a labor dispute in which negotiations for settlement have failed if either party to the dispute, before a notice to strike or lockout, files a petition requesting the conciliator to act in the dispute, setting forth the issues of the dispute and the efforts to agree and the failure to reach an agreement. If the conciliator takes jurisdiction he shall then proceed as provided in subdivision 1."

## APPENDIX 2

OPINION 104 REPORT OF MINNESOTA ATTORNEY GENERAL FOR 1940

"Unlawful Acts—Subject to criminal prosecution—L39, C440 S 11, 13. M27 S 9922, 10047.

Ramsey County Attorney.

You ask:

(1) Whether the matters which are hereinafter stated constitute such unlawful acts, and

(2) If so, are the offender or offenders subject to criminal prosecution?

(3) "Is it unlawful and therefore a violation of the criminal laws for any person, officer or member of any labor organization to stop any motor vehicle truck upon any of the public roads, streets or highways of this state, or upon the premises of any business establishment, for the purpose of compelling or attempting to compel the owner or employee operator thereof to join a labor organization against his will, under threat of preventing such owner or employee operator from either proceeding further with his truck, loading or unloading the same at any place or business establishment within the state unless such owner or employee operator consents to and does join such labor organization and to pay a large substantial initiation fee and monthly payments thereafter without regard:

(a) To whether such owner or employee operator is a resident of this state and regularly or casually engaged.

(b) To whether such owner or employee is a resident of the state, residing outside of the Metropolitan centers and regularly or casually engaged.

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(c) To whether such owner or employee is a resident of the state, residing within the Metropolitan centers and regularly or casually engaged."

The pertinent sections of the Labor Relations Act are the following:

"Section 11. It shall be an unfair labor practice:

* * * * *

"(f) For any person to interfere in any manner with the operation of a vehicle or the operator thereof when neither the owner nor operator of said vehicle is at said time a party to a strike.

"(g) For any employe, labor organization or officer, agent or member thereof to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will or any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment.

"(h) The violation of subsections (b), (c), (d), (e), (f), and (g) of this section are hereby declared to be unlawful acts.

* * * * *

"Sec. 13. It shall be unlawful for any person at any time to interfere with the free uninterrupted use of public roads, streets, highways or methods of transportation or conveyance or to wrongfully obstruct ingress to and egress from any place of business or employment."

"Before entering upon a discussion of the question involved, we wish to point out that in your question 3 there are two separate and distinct situations set forth. The first involves actions which take place upon "any of the public roads, streets or highways of the state." The second involves actions which may take place upon the

premises of any business establishment. It will be necessary to deal with these separately.

"We shall first discuss the questions which have been raised in the light of the provisions of Section 11, paragraph (f). If "neither the owner nor operator of said vehicle is at said time a party to a strike," then it is an unlawful act to interfere in any manner with the operation of a vehicle or the operator thereof whether it be upon any of the public streets or highways or upon the premises of any business establishment or elsewhere. If there is interference within the meaning of said paragraph (f), then under the provisions of paragraph (h) such action is unlawful, and a violation would be a misdemeanor within the meaning of Mason's Minnesota Statutes of 1927, Section 10047. The punishment for the commission of such an act is prescribed by Section 9922 thereof. Whether the stopping of a motor vehicle truck under any given set of circumstances is an interference within the meaning of said paragraph (f) is a question of fact which must be determined in each individual case, first by the prosecutor when he determines if a complaint should be issued, and second by the court or jury in determining if an offense has been committed. It is not a question for the determination of which this office can lay down any general rule other than that indicated above.

"Your attention is called also to the language contained in Section 11, paragraph (g), which is set out in full hereinabove. This paragraph is of general application and this is so irrespective of whether the conduct complained of has anything to do with interference with the operation of the motor vehicle. Whether the conduct referred to in your request for an opinion constitutes an offense under said paragraph (g) is a question of fact in each individual case which must be decided in the first instance by the prosecutor before he issues a complaint and then, if the complaint is issued, by either the court or jury in determining the guilt or innocence of the accused. If the circumstances in any individual case are such as to constitute a violation of paragraph (g) then a misdemeanor will have been com-

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mitted which is punishable under Sections 9922 and 10047 above referred to.

"Referring now to Section 13 of the Minnesota Labor Relations Act, we wish to point out that the language in this section is restricted to certain localities in its operation. It also defines two distinct kinds of offenses. Interference with the free and uninterrupted use of public roads, streets, highways or methods of transportation or conveyance constitutes one class of offenses. Wrongfully obstructing ingress to and egress from any place of business or employment constitutes another class. In the facts submitted you refer to the loading or unloading at the place or business establishment. If this interference is upon the premises of the place or business establishment, then it will not come within the provisions of said Section 13 unless it obstructs ingress to or egress from the place of business or employment. It is probably unnecessary to point out that a person who is upon the premises of any place or business establishment in disregard of the rights of the owner is a trespasser and can be dealt with under other sections of law if he is committing an offense thereunder. In considering Section 13 we must again point out, as we have in discussing Section 11, that whether or not the stopping is an interference is a question of fact which must be determined first by the prosecutor when he decides if a complaint is to be issued and then by the court or jury in determining the guilt or innocence of the accused. These are purely questions of fact upon which this office cannot pass.

"We have quoted above paragraphs (a), (b) and (c) in which you enumerate different circumstances. In our opinion it makes no difference where the owner or employe operator resides or whether he is regularly or casually engaged in operating a motor vehicle.

GEO. B. SJOSELIUS,
*Special Assistant Attorney General.*

August 11, 1939."